(3)

No. 89-1679

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1989

SUMMIT HEALTH, LTD., a corporation; MIDWAY HOSPITAL MEDICAL CENTER, a California general hospital; THE MEDICAL STAFF OF MIDWAY HOSPITAL MEDICAL CENTER, an unincorporated association; MITCHELL FELDMAN; AUGUST READER, ARTHUR N. LURVEY; RICHARD E. POSELL; JONATHAN I. MACY; JAMES J. SALZ; GILBERT PERLMAN; PEGGY FARBER; MARK KADZIELSKI; and WEISSBURG & ARONSON,
Petitioners,
vs.
SIMON J. PINHAS, M.D.
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

LAWRENCE SILVER
A LAW CORPORATION
LAWRENCE SILVER*
10920 Wilshire Boulevard
Suite 800
Los Angeles, CA 90024
(213) 443-9500

BLECHER & COLLINS
MAXWELL M. BLECHER
611 WEST SIXTH STREET
SUITE 2800
LOS ANGELES, CA 90017
(213) 622-4222
Attorneys for Respondent

* Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

1. In a hospital staff privileges antitrust case, should this Court agree to review the Ninth Circuit's interpretation of this Court's unanimous decision in *McLain v. Real Estate Board of New Orleans,* 444 U.S. 232 (1980), when there is no conflict between that interpretation and those of the other circuits relied upon by petitioner?

2. In a hospital staff privileges antitrust case, should this Court create and impose a special pleading requirement which would protect only lawyer-defendants and require a complaint to make a variety of particularized allegations concerning lawyer defendants, which special pleading requirement has not heretofore been imposed as to lawyers or any other antitrust defendants?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

CASES

No. 89-1679

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1989

SUMMIT HEALTH, LTD., a corporation; MIDWAY HOSPITAL MEDICAL CENTER, a California general hospital; THE MEDICAL STAFF OF MIDWAY HOSPITAL MEDICAL CENTER, an unincorporated association; MITCHELL FELDMAN; AUGUST READER, ARTHUR N. LURVEY; RICHARD E. POSELL; JONATHAN I. MACY; JAMES J. SALZ; GILBERT PERLMAN; PEGGY FARBER; MARK KADZIELSKI; and WEISSBURG & ARONSON,
Petitioners,
vs.
SIMON J. PINHAS, M.D.
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

LIST OF PARTIES

All parties are identified in the List of Parties contained in the Petition for Certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals is set forth in the Appendix to the Petition for Certiorari and is reported as *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024 (9th Cir. 1990).

STATEMENT OF THE CASE

In this case, Dr. Simon J. Pinhas, a surgeon, claims that he was deprived of his hospital staff privileges at Midway Hospital Medical Center ("Midway") in Los Angeles in a manner violative of the Due Process Clause of the Fourteenth Amendment and Section 1 of the Sherman Antitrust Act. After Midway convened peer review proceedings against him, he brought suit in U.S. District Court against the hospital, its administrators, their attorneys, and his physician-competitors. The District Court dismissed Pinhas' Complaint.

On appeal, the Ninth Circuit affirmed the dismissal of Pinhas' due process claim but reversed the dismissal of his antitrust claim. As to the due process claim, the Court found that Pinhas had failed to demonstrate that the peer review process initiated by a private hospital sufficiently demonstrated "state action" under the Fourteenth Amendment, relying on this Court's decisions in *Lugar v. Edmondson Oil Company, Inc.*, 457 U.S. 922 (1982) and *Blum v. Yaretsky*, 457 U.S. 991 (1982). As to the antitrust claim, the Court, relying on *Patrick v. Burget*, 486 U.S. 94 (1988), held that the antitrust state action doctrine did not protect peer review decisions from the application of the antitrust laws.

All of the defendants have filed a Petition for Certiorari to this Court seeking to have this Court review the Ninth Circuit's reinstatement of Pinhas' antitrust cause of action. Pinhas has responded with a Brief in Opposition and has also filed a Cross-Petition for Certiorari, asking this Court to consider the dismissal of his due process claim.

SUMMARY OF ARGUMENT

Petitioners ask this Court to resolve a conflict in the circuits generated by the Ninth Circuit's decision in the instant *Pinhas* decision. The simple response to this request is that there is no conflict and, hence, this Court should not devote its resources to confirm the absence of such a conflict. This Court in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980) set the standard for establishing jurisdiction under the Sherman Act. All federal circuits have used their own words to express their understanding of *McLain* and to apply *McLain* to the myriad fact situations which generate antitrust litigation. That, without more, does not create conflict. Indeed, given the variety of voices through which the circuits speak, there has been general harmony in the circuits' application of *McLain's* precepts.

Petitioners have also urged that this Court use this case as the opportunity to create and impose a special pleading requirement to protect attorneys against antitrust claims. Not only is such a proposal unwise, but this special pleading point is of isolated interest and is not one which should command the attention of this Court.

ARGUMENT

I.

THERE IS NO CONFLICT BETWEEN THE *PINHAS* DECISION AND THE DECISIONS IN OTHER CIRCUITS RELIED ON BY PETITIONERS

In a case packed with significant antitrust and Constitutional issues, petitioners have chosen to limit their request for review to an isolated issue. They focus upon this Court's decision in *McLain v. Real Estate Board of New Orleans*, 444 U.S. 232 (1980) and claim that the Ninth

Circuit's interpretation of that decision in this case bespeaks a conflict between it and other circuits over the treatment of hospital staff privileges antitrust claims. Petitioners claim that this Court should resolve that conflict. Although a "conflict in the circuits" is a frequently advanced reason for seeking certiorari, petitioners are here attempting to create a conflict where none exists. Certiorari intervention is, thus, not appropriate.

This Court made resoundingly clear in its unanimous *McLain* decision that jurisdiction under the Sherman Act extends not only to activities actually in interstate commerce, but also to activities wholly local in nature which substantially affect interstate commerce. *McLain, supra,* at 242. Respondent here has made the latter claim. Hence, to establish jurisdiction at the pleading stage, respondent must, first, identify a relevant aspect of interstate commerce and, second, show petitioners' activities " 'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved." *Id.,* at 246.

In *McLain,* real estate purchasers and sellers alleged a conspiracy by real estate brokers to fix real estate commissions. This Court stated that "respondents' brokerage activities" must have a not insubstantial effect on interstate commerce. The question petitioners have chosen to raise is: What did this Court mean by the phrase "respondents' brokerage activities" when it said that to establish the jurisdictional element of a Sherman Act violation it is sufficient to demonstrate a substantial effect on interstate commerce "generated by respondents' brokerage activity"? *Id.,* at 242.

Petitioners claim that the Ninth Circuit has looked to all of defendants' overall or general business activities in answering this question and that this approach puts it at odds with other circuits which have looked only to the

specific conduct alleged to be violative of the antitrust laws. A review of the authorities cited by petitioners shows that there is no conflict between the *Pinhas* decision and the decision of other circuits. Indeed, Ninth Circuit decisions rendered prior to *Pinhas* have shown themselves to be in accord with the other circuits which petitioners reference on this very issue. Let it be clearly said that the circuits do not employ identical words to analyze *McLain* and express their understanding of it. Each speaks with its own voice. Yet there is no disagreement.

The exclusive source for petitioners' claim of a conflict in the circuits is the Ninth Circuit's decision in *Western Waste Service Systems v. Universal Waste Control,* 616 F.2d 1094 (9th Cir.) *cert. denied,* 449 U.S. 869 (1980) (Kennedy, J.). It is true that there is general language in *Western Waste* which, given an expansive reading, might lead one to conclude that the Ninth Circuit will find that antitrust jurisdiction exists merely on a showing that a defendant's general or overall business activities affect interstate commerce. Yet that conclusion must be placed in context with subsequent Ninth Circuit decisions that have failed to employ any such expansive reading.

Western Waste involved a claim brought by one local waste disposal company against another claiming that the latter had attempted to monopolize that business in Phoenix, Arizona. Although *Western Waste* reads *McLain* as allowing jurisdiction to be satisfied if defendant's "rubbish collection business" (*Id.,* at 1097) substantially affected interstate commerce, nevertheless the opinion takes great pains to demonstrate that plaintiff also alleged that the defendant's antitrust violations themselves substantially affected interstate commerce. Although the court might have felt freed by its interpretation of

McLain to look only to defendant's general business activity, it nevertheless felt constrained to satisfy itself that the specific complained of activity affected interstate commerce. And it did so. Hence, the result reached in *Western Waste* is consistent with the result which would have been reached under any of the circuit decisions to which petitioners refer.

In a decision rendered shortly after *Western Waste*, the Ninth Circuit articulated its application of *McLain*, an application consistent with the other circuits. In *Palmer v. Roosevelt Lake Log Owners Association, Inc.*, 651 F.2d 1289 (9th Cir. 1981), the Ninth Circuit reviewed the dismissal of a Sherman Act claim brought by a small family business engaged in retrieving logs which were lost and abandoned on Roosevelt Lake while they were being transported by timber companies to local lumber mills. Plaintiff complained that these timber companies were restraining trade in the gathering, transporting and sale of these abandoned logs by warning the lumber mills not to purchase such logs from plaintiff. The Ninth Circuit, in reversing the dismissal of plaintiff's complaint, did refer to the *Western Waste* opinion, but did not rely upon it for its interpretation of *McLain*. Indeed, the *Palmer* court's analysis is remarkably consistent with the interpretation given McLain by the other circuits which petitioners here identify.

Thus, the *Palmer* court, in attempting to determine whether the defendants' activities in the case substantially affected interstate commerce, first looked to *McLain* and then expressed its understanding of *McLain* in the following passage:

> "... [T]o establish jurisdiction it would be sufficient to show that the defendants' brokerage activities, i.e., *that part of the '[defendants'] activities infected by the price-fixing conspiracy,'* had a substantial effect on interstate commerce." *Id.*, at 1291. (Emphasis added.)

And in applying that standard to the fact pattern before it, the court said its task was to determine:

> "whether the activities allegedly infected by the unlawful restraint — *in this case, the retrieval of salvaged logs on Roosevelt Lake and their sale to lumber mills* — have, as a matter of practical economics, a not unsubstantial effect on interstate commerce in Washington lumber and lumber products." *Id.*, at 1292. (Emphasis added.)

Even more recently, in a hospital privileges case, the Ninth Circuit studiously avoided being pinned to any expansive reading of *Western Waste*. *Mitchell v. Frank R. Howard Memorial Hospital*, 853 F.2d 762 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1123 (1989). The hospital defendants had argued that it was only its allegedly "infected" activities — not its general business activities — which should be considered in determining whether Sherman Act jurisdiction exists. The plaintiff radiologist had claimed that it was the totality of the Hospital's general business activities which must be considered. Since the court found that plaintiff had failed to establish Sherman Act jurisdiction under either criterion, it did not find it necessary to speak to the continued efficacy of the potentially broad *Western Waste* standard. *Id.*, at 764, n. 1.

The Ninth Circuit's careful insistence that Mitchell's complaint failed to meet either standard and its express refusal to accept a broad reading of *Western Waste* as embodying the Ninth Circuit's law on this jurisdictional issue strongly suggests that the Ninth Circuit does not

apply any such broad test. The *Mitchell* court's failure to rely on *Western Waste* as the Ninth Circuit's rule on this point is all the more telling when one considers that the case *discusses* decisions from two other Circuits (relied upon by petitioners here) which cite *Western Waste* as expressing the Ninth Circuit rule and evincing a conflict between the circuits. *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 723, n. 3 (10th Cir. 1980); *Hayden v. Bracy*, 744 F.2d 1338, 1343, n. 2 (8th Cir. 1984). The *Mitchell* court showed no interest in agreeing with the other Circuits' surmise.[1]

The Ninth Circuit's decision in the instant case is consistent with the earlier Ninth Circuit decision in *Palmer*. It does not purport to examine whether all of petitioners' activities have an effect on interstate commerce. It does not rely on *Western Waste*. Its analysis is, in fact, consistent with the analysis employed in other Circuits. Thus, Judge Wiggins states that:

> "Pinhas must show that 'as a matter of practical economics' the activities of the appellees — *the peer review process in general* — have a 'not insubstantial effect on the interstate commerce involved.' " *Pinhas, supra*, at 1032. (Emphasis added.)

[1]It is worth noting that petitioners have cited no circuit court decision since *Mitchell* which views the Ninth Circuit as creating a split in the circuits. Although several of the circuit court cases cited by petitioners expressed a belief that the Ninth Circuit's view of *McLain* gives rise to a split in the circuits, only one refers to any case in the Ninth Circuit other than *Western Waste* or rendered since then to posit such a conflict. The sole exception is *Hayden v. Bracy*, 744 F.2d 1338 (8th Cir. 1984). Although it cites to *Western Waste* as a source of the conflict, it also erroneously cites *Hahn v. Oregon Physician Service*, 689 F.2d 840 (9th Cir. 1983) for this belief. *Hahn*, however, which focuses upon "defendants' *relevant* activities", not the totality of defendants' activities, is consistent with *Palmer*, not a broad interpretation of *Western Waste*. *Id.*, 689 F.2d at 844.

The Ninth Circuit's opinion in this case is not referring to all of the defendants' general or overall business activities, but only those specific activities which have been "infected" by the illegality. *McLain, supra*, 444 U.S. at 246. The Ninth Circuit's opinion in this case is consistent with the articulated standard for the actionable antitrust injury. The Ninth Circuit's opinion in this case is not in conflict with the opinions of other circuits.

Thus, when the Second Circuit in *Furlong v. Long Island College Hospital*, 710 F.2d 922, 926 (2d Cir. 1983) identifies its standard as:

> "whether *the defendants' activity that has allegedly been 'infected' by unlawful conduct* can be shown ' "as a matter of practical economics" to have a not insubstantial effect on the interstate commerce involved.' " (Emphasis supplied),

it is employing no different formula than the Ninth Circuit in *Palmer* and *Pinhas*.[2]

[2]The Second Circuit's view has been expressly adopted by the Seventh Circuit (*Seglin v. Esau*, 769 F.2d 1274, 1280 (7th Cir. 1985)) and the Sixth Circuit (*Stone v. William Beaumont Hospital*, 782 F.2d 609, 614 (6th Cir. 1986)). A similar form of words is employed in the Eighth Circuit where plaintiff must show that the "challenged conduct" affected interstate commerce. *Hayden v. Bracy*, 744 F.2d 1338, 1343, n. 2. (8th Cir. 1984). See also *Cordova & Simonpieti Insurance Agency, Inc. v. Chase Manhattan Bank, N.A.*, 649 F.2d 36, 45 (1st Cir. 1981) where it is the defendant's infected activities which are examined.

Moreover, when the Tenth Circuit said in *Crane v. Intermountain Health Care, Inc.*, 637 F.2d 715, 723 (10th Cir. 1981):

> "In context, then, the Court [in *McLain*] was referring to the *challenged* activities, not the brokers' overall business, by its reference to 'respondents' brokerage activities' in the passage Dr. Crane relies upon." (emphasis in original),

it was saying nothing substantively different than what the Ninth Circuit said in *Palmer* when it interpreted *McLain's* reference to "defendants' brokerage activities" to mean "that part of the '[defendants'] activities infected by the price-fixing conspiracy." *Palmer, supra,* 651 F.2d at 1291. The *Palmer* analysis was expressly followed in the instant case.

Indeed, in every case, as the Tenth Circuit noted, "[t]he analytical focus continues to be on the nexus, assessed in practical terms, between interstate commerce and the challenged activity." *Crane, supra,* 637 F.2d at 724. As the Ninth Circuit recognized in *Mitchell, supra,* 853 F.2d at 765, "[W]hether a hospital's activities sufficiently affect interstate commerce to create Sherman Act jurisdiction is a highly fact-based question calling for common sense judgment." Each circuit in applying *McLain* to a hospital staff privileges case must employ its own common sense judgment and apply this Court's guidance to those factual questions. The use of different words by different circuits to express their understanding of that guidance does not, without more, give rise to a conflict in the circuits warranting certiorari review. On the issue raised, there is no fundamental dispute between the Ninth Circuit and the other circuits relied upon by petitioner. This Court should deny the petition for certiorari.

II.

THIS COURT SHOULD NOT CREATE AND IMPOSE A SPECIAL PLEADING REQUIREMENT TO PROTECT ATTORNEYS FROM ANTITRUST CLAIMS

The second issue which petitioners have framed for review is striking, not simply because it appears to be a matter of personal interest and benefit only to the lawyers among and lawyers for the petitioners, but also because it asks this Court to establish a special pleading requirement for any antitrust claim brought against a lawyer.

Petitioners assert that this Court should review the refusal of the Court of Appeals to uphold the dismissal of Pinhas' antitrust claim directed against the Hospital's attorneys because their lawyers were only acting as agents of the Hospital's parent company. They insist that their lawyers should receive the benefit of a protectionist special pleading requirement which they would have imposed on prospective antitrust plaintiffs — a special pleading requirement which would require a "particularized allegation that counsel had a separate economic interest, and were separate economic actors, and find that assertions that counsel were enlisted to provide assistance are inadequate to state a viable antitrust claim." Petition for Certiorari at page 13. They do not, at present, insist that attorneys be immunized from antitrust liability!

The Ninth Circuit made short shrift of this argument. So too should this Court. An attorney is not immune from antitrust liability if he becomes an active participant in formulating policy decisions with his client to restrain competition. *Tillamook Cheese & Dairy Association v. Tillamook County Creamery Association,* 358 F.2d 115 (9th Cir. 1966). The Ninth Circuit found that at this pleading

stage, Pinhas had sufficiently alleged that the attorneys "exerted their influence over Summit Health and Midway so as to direct them to engage in the complained of acts for an anticompetitive purpose." *Pinhas, supra*, 894 F.2d at 1033. This is more than agency. Plaintiff's First Amended Complaint, paragraphs 12, 17, 18, 37, 47, 53, 54, 55, 63 and 124 (App., at A-39, A-41, A-47, A-49, A-51, A-53, A54, A-74 and A-75) sufficiently alleges conduct by the attorneys petitioners which goes beyond mere agency and constitutes active participation in the policy decision engaged in by the other petitioners to violate respondent's rights under the antitrust laws. *Brown v. Donco Enterprises, Inc.*, 783 F.2d 644 (6th Cir. 1986).[3]

Moreover, as this Court recognized in *McLain*,

> "It is axiomatic that a complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief' [citation] This rule applies with no less force to a Sherman Act claim . . ." *McLain, supra*, 444 U.S. at 246.

There is no reason to carve out an exemption from antitrust liability for attorneys. The protectionist special pleading requirement which the petitioners seek for their lawyers would have just such an effect. Nor should this Court disturb the healthy pleading standard set forth in *Conley v. Gibson*, 355 U.S. 41 (1957) and easily met in the instant case. There is no reason why this Court should grant review to examine an issue which is of isolated interest to only some of the petitioners in this case.

---

[3]The substantial exhibits incorporated by reference into the First Amended Complaint, but not reprinted in the Appendix to the Petition, further amplify the actionable antitrust role of the attorney petitioners.

CONCLUSION

For the reasons set forth herein, this Court should deny the Petition for Certiorari.

DATED: May 29, 1990

Respectfully Submitted,

LAWRENCE SILVER
A Law Corporation
and LAWRENCE SILVER
and
BLECHER & COLLINS
and MAXWELL BLECHER

By: _____
Lawrence Silver,
Attorneys for Respondent
Simon J. Pinhas, M.D.